121

No. 08-765

Supreme Court, U.S.
FILED
FEB 23 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

JEREMY JAYNES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Thomas M. Wolf
Counsel of Record
LECLAIR RYAN
A PROFESSIONAL CORPORATION
951 East Byrd Street, 8th Floor
Richmond, Virginia 23219
(804) 916-7143

Counsel for Respondent

Joseph M. Rainsbury
LECLAIR RYAN
A PROFESSIONAL CORPORATION
1800 Wachovia Tower
Drawer 1200
Roanoke, Virginia 24006
(540) 510-3055

Counsel for Respondent

THE LEX GROUP^{DC} ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroupdc.com

QUESTION PRESENTED

When the Virginia Supreme Court compared Virginia Code § 18.2-152.3:1's plainly legitimate sweep to the protected speech forbidden by the statute, found that the statute's overbreadth was "substantial," and concluded that there was a realistic likelihood that the statute would reach—and chill—protected speech, did it err by failing also to conduct a statistical "comparative analysis" of the number of potentially legitimate applications versus potentially illegitimate applications?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. VIRGINIA RAISES ITS "COMPARATIVE ANALYSIS" ARGUMENT FOR THE FIRST TIME IN ITS PETITION 5

II. THERE IS NO SPLIT IN THE LOWER COURTS ABOUT THE STANDARD FOR SUBSTANTIAL OVERBREADTH 7

A. The "Absolutist" Jurisdictions Are Not Absolutist 9

B. The "Comparative" Jurisdictions Are Not Comparative 12

III. THE PRACTICAL SIGNIFICANCE OF THIS CASE TO ANTI-SPAM EFFORTS IS NEGLIGIBLE 13

IV. THE VIRGINIA SUPREME COURT CORRECTLY APPLIED THE OVERBREADTH DOCTRINE 15

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

ACLU v. Miller,
977 F. Supp. 1228 (N.D. Ga. 1997) 9

ACLU v. Mukasey,
534 F.3d 181 (3d Cir. 2008), *cert. denied*,
2009 U.S. LEXIS 598 (Jan. 21, 2009) 12

Ashcroft v. ACLU,
542 U.S. 656 (2004).....12

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002).....7

Board of Trustees of State Univ. of N.Y. v. Fox,
492 U.S. 469 (1989).....7

Borden v. School District of the Township of East Brunswick,
523 F.3d 153 (3d Cir. 2008) 12

Broadrick v. Oklahoma,
413 U.S. 601 (1973).....7, 8

City of Chicago v. Morales,
527 U.S. 41 (1999).....7

City of Houston v. Hill,
482 U.S. 451 (1987).....7

City of Maquoketa v. Russell,
484 N.W.2d 179 (Iowa 1992) 11

Coates v. City of Cincinnati,
402 U.S. 611 (1971).....8

DeJohn v. Temple Univ.,
537 F.3d 301 (3d Cir. Aug. 4, 2008) 13

Hawaii v. Beltran,
172 P.3d 458 (Haw. 2007) 10

Idaho v. Casey,
876 P.2d 138 (1994) 10

Kolender v. Lawson,
461 U.S. 352 (1983) 7

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995) 20

Members of City Council of City of Los Angeles v. Taxpayers for Vincent,
466 U.S. 789 (1984) 8

Milavetz, Gallop & Milavetz, P.A. v. United States,
541 F.3d 785 (8th Cir. 2008) 9

New York v. Ferber,
458 U.S. 747 (1982) 7, 16

Osborne v. Ohio,
495 U.S. 103 (1990) 7

R. A. V. v. City of St. Paul,
505 U.S. 377 (1992) 16

Reno v. ACLU,
521 U.S. 844 (1997) 20

Talley v. California,
362 U.S. 60 (1960) 20

Thornhill v. Alabama,
310 U.S. 88 (1940) 7

United States v. Twombly,
475 F. Supp. 2d 1019 (S.D. Cal. 2007) 9, 20

United States v. Williams,
128 S. Ct. 1830 (2008) ..... *passim*

Virginia v. Hicks,
539 U.S. 113 (2003) 2, 7

Watchtower Bible & Tract Society v. Village of Stratton,
536 U.S. 150 (2002) 20

Yee v. City of Escondido,
503 U.S. 519 (1992) 7

CONSTITUTIONAL PROVISION

U.S. CONST. amend. I ..... *passim*

STATUTES

15 Okla. Stat. § 776.2 14
15 Okla. Stat. § 776.7 14
15 U.S.C. § 7704(a) 20
28 U.S.C. § 1257 7
Ariz. Rev. Stat. § 44-1372.01 19
Ark. Code Ann. § 4-88-603 19
Cal. Bus. & Prof. Code § 17538.45 19
Colo. Rev. Stat. § 6-1-702.5 19
Fla. Stat. § 668.603 19
Idaho Code § 48-603E 14, 19
Ill. Comp. Stat. tit. 815, § 511/10 19
Ind. Code § 24-5-22-7 19
Kan. Stat. § 50-6, 107 19
La. Rev. Stat. § 14:73.1(13) 14, 19
Md. Crim. Law Code § 3-805.1 19
Me. Rev. Stat. tit. 10, § 1497 19
Mich. Comp. Laws § 445.2504 19
Minn. Stat. § 325F.694 19
Mo. Rev. Stat. § 407.1138 19

N.C. Gen. Stat. § 14-458 19
N.D. Cent. Code § 51-27-02 19
N.M. Stat. Ann. § 57-12-23 19
Ohio Rev. Code § 2307.64 19
S.D. Codified Laws § 37-24-6 19
Tenn. Code Ann. § 47-18-2501 19
Tex. Bus. & Com. Code § 46.002 19
Va. Code § 18.2-10(f) 1
Va. Code § 18.2-152.2 22
Va. Code § 18.2-152.3:1 ..... *passim*
Va. Code § 18.2-152.3:1(A) 1
Va. Code § 18.2-152.3:1(B) 1
Va. Code § 18.2-152.3:2 22
W. Va. Code § 46A-6G-5 14
Wash. Rev. Code § 19.190.020 19
Wyo. Stat. § 40-12-402 19

RULE

Sup. Ct. R. 10 11

OTHER AUTHORITIES

House Bill No. 1796 22

John Levine,
"Virginia Court Overturns Anti-Spam Law, Sept. 13, 2008, http://www.cauce.org/archives/87-Virginia-Court-Overturns-anti-spam-law.html (last visited February 5, 2009) 15

STATEMENT OF THE CASE

Respondent Jeremy Jaynes was sentenced to nine years in prison for violating Virginia Code § 18.2-152.3:1, Virginia's anti-spam statute. Under this statute, it is a crime for a person to include false identifying information in a mass-distributed e-mail:

> [A]ny person is guilty of a crime if he:
>
> Uses a computer or computer network with the intent to falsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer of an electronic mail service provider or its subscribers.

Va. Code § 18.2-152.3:1(A). Where the defendant attempts to send messages to more than 10,000 attempted recipients in a 24-hour period, it is a Class 6 felony, punishable by up to five years in prison for each offense. Va. Code § 18.2-152.3:1(B); Va. Code § 18.2-10(f). Jaynes was convicted on three counts and sentenced to three years on each, to run consecutively, for a total of nine years.

Jaynes appealed his conviction to the Court of Appeals of Virginia and then to the Supreme Court of Virginia. He mounted a facial challenge to the statute. That is, he claimed that even though his own conduct could constitutionally be regulated, Code § 18.2-152.3:1 was overbroad and violated the rights of persons who were not before the Court.

Virginia opposed Jaynes's attempt to mount a facial challenge. It claimed that the facial-standing issue was governed by state law and that, as a

matter of Virginia law, Jaynes could not raise a facial challenge.[1] It also argued that Jaynes could not mount a facial challenge because he was engaged in unprotected commercial speech. Finally, Virginia argued that the court should adopt a construction of the statute that limited its application to constitutionally unprotected speech.

In its unanimous September 12, 2008 decision, the Virginia Supreme Court rejected Virginia's arguments and reversed Jaynes's conviction. The court noted that the statute made it a crime to send bulk e-mails anonymously. While it acknowledged that commercial bulk e-mails might constitutionally be regulated in this manner, it found that the statute extended beyond this to encompass non-commercial bulk e-mails. Because the statute encroached on protected anonymous speech, the court permitted Jaynes to raise a facial challenge to it.

Examining the statute on the merits, the court found that it had not been crafted with the care or precision that the First Amendment requires. By its plain terms, the statute extended well beyond the fraudulent and otherwise illegal e-mail that Virginia claimed was the statute's true target:

> Code § 18.2-152.3:1 is not limited to instances of commercial or fraudulent transmission of e-mail, nor is it restricted to transmission of illegal or otherwise unprotected speech such as

---

[1] Virginia relied principally on this Court's decision in *Virginia v. Hicks*, 539 U.S. 113 (2003). In that case, this Court stated, "[W]hether Virginia's courts should have *entertained* this overbreadth challenge is entirely a matter of state law." *Id.* at 121 (emphasis in original). The parties disagreed how that holding in *Hicks* applied to the facts of this case.

> pornography or defamation speech. Therefore, viewed under the strict scrutiny standard, Code § 18.2-152.3:1 is not narrowly tailored to protect the compelling interests advanced by the Commonwealth.

(Pet. App. at 24-25). Accordingly, the court found that the "statute is overbroad on its face because it prohibits the anonymous transmission of all unsolicited bulk e-mails including those containing political, religious or other speech protected by the First Amendment," and it reversed Jaynes's conviction.[2]

This appeal followed.

REASONS FOR DENYING THE WRIT

The Petition in this case is more remarkable for what it omits than for the actual question it presents.

To begin, Petitioner does *not* seek review on the substantive First Amendment issue addressed below; namely, whether Code § 18.2-152.3:1 was narrowly tailored to protect a compelling state interest. For good reason. The statute in question encompasses all anonymous emails—even those

---

[2] In the proceedings before the Virginia Supreme Court, Jaynes presented alternate grounds for reversing his conviction; namely, that Code § 18.2-152.3:1 was void for vagueness and that the practical effect of the statute was to regulate interstate commerce, in violation of the dormant Commerce Clause. Because the Virginia Supreme Court disposed of the issue on First Amendment grounds, it did not reach those issues. Nevertheless, these issues present alternate grounds for affirmance.

advocating political causes or proselytizing for religious creeds—and makes it a felony to send out an e-mail blast without properly identifying oneself. Yet Virginia presented no evidence that non-commercial bulk e-mail was a significant problem that the legislature needed to address. Thus, the statute was not narrowly tailored and cannot survive strict scrutiny on the merits.

Nor has the Petitioner sought review on the substantive question of whether the First Amendment protects the right to send anonymous non-commercial communications about religion and politics. And rightly so, for that too is settled law.

Petitioner instead restricts its appeal to the question of facial standing. But here, again, the appeal is noteworthy for what it does not argue. Petitioner does not ask this Court to address the specific question of whether and when a court should entertain a facial challenge to a statute that requires Internet users to identify themselves. Again, there is a good reason for this: the courts that have addressed facial standing in this context analyze the issue identically—the outcome hinges on whether or not the statute in question targets protected non-commercial speech.[3] So there is no split in authority that would justify certiorari.

Instead, Petitioner has constructed a highly abstract question about the means of conducting overbreadth analysis—an approach that demands mathematical precision in comparing the number of instances in which the statute would be applied unconstitutionally with the number of instances in which the statute would be applied constitutionally.

---

[3] *See infra* note 7.

But Petitioner never presented that argument to the Virginia Supreme Court. Moreover, Petitioner has not shown that the lower courts are divided on the question. At best, it has shown that there have been a number of fact-bound decisions in various federal and state courts that apply the same general principles to a wide variety of disparate situations. Nor, indeed, is the decision below contrary to this Court's teachings on substantial overbreadth. For all these reasons, set forth more fully below, this Court should deny certiorari.

I. VIRGINIA RAISES ITS "COMPARATIVE ANALYSIS" ARGUMENT FOR THE FIRST TIME IN ITS PETITION.

As an initial matter, this Court should deny certiorari because the arguments that Virginia advances in its Petition were not presented below.

In its Petition, Virginia argues that the Supreme Court of Virginia erred because, in evaluating whether Jaynes could make a facial challenge, it did not carefully "compar[e] the constitutional applications (legitimate sweep) to the unconstitutional applications." (Pet. at 12-13). It claims that the overbreadth doctrine required the lower court to undertake a "comparative analysis" in which it contrasts the quantity of "plainly legitimate applications" with the quantity of "application[s] to protected speech." (Pet. at 17, 21).

These are new arguments. In the proceedings before the Virginia Supreme Court, the Commonwealth presented entirely different reasons for why it thought that Jaynes did not have the right to mount a facial challenge to Code § 18.2-152.3:1. First, it argued that the question was a matter of

state law, not federal law, and that Virginia's law of standing barred Jaynes's facial challenge: "[T]he question of who may bring a facial challenge alleging overbreadth is a matter of state law." (Comm. Br. at 26). Second, it argued that Jaynes could not raise a facial challenge because Jaynes himself was engaged in unprotected speech: "A litigant, such as Jaynes, who engages in commercial speech should not be allowed to pursue a facial challenge alleging overbreadth." (Comm. Br. at 28). Third, it argued that the court should adopt a construction of the statute that exempted "unsolicited bulk non-commercial e-mail that does not involve criminal activity, defamation, or obscene materials" and that applied only where the recipient's ISP "actually objects to the bulk e-mail." (Comm. Br. at 35-36). Petitioner lost all three of these arguments, but has not appealed the Virginia Supreme Court's rulings on any of those points.

Relevant here, Petitioner did *not* argue—as it now does—that, before entertaining a facial challenge, the court had to undertake a "comparative analysis," measuring the quantity of protected speech affected by the statute versus unprotected speech affected by the statute.[4]

---

[4] The only discussion of "overbreadth" in Virginia's brief to the Supreme Court of Virginia appears in Section V. (Comm. Br. at 34). But that discussion addresses only the substantive constitutionality of the statute, not Jaynes's standing to present a facial—as opposed to an as-applied—challenge to the statute. This is made clear by the heading to that section, which states "*Assuming that Jaynes may bring a facial challenge* alleging overbreadth, then the act is not overbroad." (Comm. Br. at 32) (emphasis added). In other words, that argument presupposed that Jaynes could raise a facial challenge—precisely the point Virginia now disputes.

Arguments not raised below are waived on appeal. *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) ("In reviewing the judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below."). Because Virginia did not present its "comparative analysis" argument below, this Court should deny certiorari.

II. THERE IS NO SPLIT IN THE LOWER COURTS ABOUT THE STANDARD FOR SUBSTANTIAL OVERBREADTH.

The overbreadth doctrine originated in *Thornhill v. Alabama*, 310 U.S. 88 (1940), and has been discussed in dozens of this Court's decisions in the ensuing decades.[5] By now, "the elements of First Amendment overbreadth analysis are familiar." *City of Houston v. Hill*, 482 U.S. 451, 458 (1987). So, too, is the principle of "substantial overbreadth." *See New York v. Ferber*, 458 U.S. 747, 772 (1982) ("The premise that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications is hardly novel."). Time and again during the last quarter century—and as recently as last term—this Court has reiterated that for a statute to be subjected to a facial challenge, its

---

[5] *See, e.g., Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002); *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999); *Osborne v. Ohio*, 495 U.S. 103, 112 (1990); *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482-83 (1989); *City of Houston v. Hill*, 482 U.S. 451, 458-59 (1987); *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-13 (1973).

"overbreadth [must be] substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008).[6]

In its Petition, however, Virginia claims that there is a conflict among jurisdictions about how to apply this Court's substantial-overbreadth test. Cherry-picking a handful of lower-court cases from the last three decades of overbreadth litigation, Virginia claims that there is a "deep" conflict of authority on the standard for evaluating substantial overbreadth. (Pet. at 23-27). It posits the existence of two opposing camps: (1) an "absolutist" cadre, comprising the Eighth Circuit, Virginia, Hawaii, Idaho, and Iowa, that will—Virginia claims—strike down a statute on First Amendment grounds wherever there is a "conceivable" possibility that protected speech might be threatened; and (2) a

---

[6] Although the Court frequently has invoked and applied its substantial-overbreadth standard, it has resisted attempts to make the test any more fine-grained than that. The reason lies in the difficulty of the subject matter. *See Broadrick*, 413 U.S. at 615 ("It remains a 'matter of no little difficulty' to determine when a law may properly be held void on its face and when 'such summary action' is inappropriate.") (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 617 (1971)); *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) ("The concept of 'substantial overbreadth' is not readily reduced to an exact definition."). Whether a particular statute or ordinance is substantially overbroad is a context-specific inquiry that requires the reviewing court to make a nuanced and pragmatic evaluation of the law being examined. It is not a subject that lends itself well to prongs, bright lines, or numerical cut-offs. Applying the doctrine requires sound judgment—not wooden application of a rigid rule.

"comparative" group of courts, comprising the First, Third, and Tenth Circuits, that approaches the issue with mathematical objectivity—comparing the relative incidence of protected versus unprotected speech and allowing facial challenges only when that ratio is high.

A review of the cases and jurisdictions reveals no real conflict of the sort that Virginia describes. It simply illustrates the highly context-specific nature of the substantial-overbreadth inquiry.

A. The "Absolutist" Jurisdictions Are Not Absolutist.

To begin, the decisions that Virginia characterizes as "absolutist" are actually a heterogeneous group of cases. They arise in factual circumstances very different from those presented here.[7] Indeed, many of them do not even address whether, and under what circumstances, a party may make a facial challenge in the First Amendment context.

Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785 (8th Cir. 2008), for example,

---

[7] Jaynes notes that the two lower court cases that have dealt with the issue of substantial overbreadth in the specific context of anonymous Internet speech have both analyzed the issue similarly to the Supreme Court of Virginia—focusing on whether the statute extended beyond commercial speech. *See ACLU v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997) (allowing facial challenge to Georgia Internet-identity statute because it extended to protected non-commercial speech), and *United States v. Twombly*, 475 F. Supp. 2d 1019, 1024 (S.D. Cal. 2007) (rejecting facial challenge to federal CAN-SPAM statute because statute was restricted to commercial speech). Virginia fails to cite either of these cases.

involved a bankruptcy statute that made it illegal for a "debt relief agency" to advise a debtor to amass more debt before filing for bankruptcy. The court found that "*as applied*" to attorneys, the statute was unconstitutional because it unlawfully intruded upon the ability to advise the client on bankruptcy matters.

Even less relevant is the holding in *Hawaii v. Beltran*, 172 P.3d 458, 464 (Haw. 2007), which was decided under Hawaiian constitutional law. This was a challenge to an ordinance that required a permit for "camping," but which defined "camping" to mean any activity that looked like setting up a residence—regardless of the actual conduct involved. The court noted that this definition was overbroad because it encompassed conduct protected by the *Hawaii* constitution: "The limitless net cast by the Rule would seemingly reach a substantial amount of constitutionally protected conduct *under the Hawai'i Constitution*." Id. (emphasis added).

Even the purported "absolutist" cases that *do* involve actual, facial, First Amendment challenges are themselves not remarkable or absolutist. *Idaho v. Casey*, 876 P.2d 138 (1994), for example, involved a statute that made it a crime to interfere with lawful hunting. The statute's "statement of purpose" declared that it was aimed at "protest groups" who had, in the past, deliberately interfered with hunting activities. The court agreed that there was a "realistic danger" that the statute would interfere with protected speech—e.g., members of protest groups who verbally expressed their opposition to hunting. Id. at 140-41. Given the history and stated purpose of the statute to rein in "protest groups,"

this was a fair assessment of the likely effect of this statute on free speech.

The other state supreme court case[8] that Virginia cites, *City of Maquoketa v. Russell*, 484 N.W.2d 179, 185-86 (Iowa 1992), was a facial challenge to a curfew ordinance that made it a crime for minors to be in a public place after 11 p.m. without parental escort or permission. The Supreme Court of Iowa held that this ordinance impermissibly restricted minors' rights of assembly, religion, and speech. As the ordinance was a blanket prohibition on *any public conduct* after 11 p.m., the court found that it was reasonable to suppose that the statute infringed on much conduct that was protected by the First Amendment. This was not a law struck down on the basis of a single, fanciful hypothetical. It was invalid because it criminalized a broad range of protected conduct—viz., *any* public activity after 11 p.m.

These cases, in short, do *not* stand for the sweeping proposition that a statute is unconstitutional if it "conceivably [could] reach constitutionally protected speech or expression." (Pet. at 27). Indeed, they define no single approach to facial challenges. Instead, they reflect pragmatic and context-specific judgments about whether the particular statutes in question would, in fact, substantially interfere with rights guaranteed by the First Amendment.

---

[8] The other two "absolutist" cases that Virginia cites are lower-court cases—a federal district court case from New York and an intermediate state appeals court from Florida. Conflicts among such courts do not ordinarily generate the sort of split in authority justifying this Court's review under Rule 10.

B. The "Comparative" Jurisdictions Are Not Comparative.

Virginia's characterization of the opposing "comparative" camp is equally flawed. The principal example it cites is the Third Circuit's decision in *Borden v. School District of the Township of East Brunswick*, 523 F.3d 153 (3d Cir. 2008). But after the Third Circuit decided *Borden*, this Court issued its decision in *Williams*, which reiterated the proper standard for substantial overbreadth.

Shortly after this Court decided *Williams*, the Third Circuit issued another facial-standing decision, which Virginia does not discuss: *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 2009 U.S. LEXIS 598 (Jan. 21, 2009). This was a First Amendment challenge to the Child Online Protection Act ("COPA"), on remand from this Court's decision in *Ashcroft v. ACLU*, 542 U.S. 656 (2004). In its July 22, 2008 decision, the Third Circuit quoted and applied this Court's formulation of the overbreadth doctrine in *Williams*. It found that the statute at issue "impermissibly places at risk a wide spectrum of speech that is constitutionally protected." *Id.* at 206. And it noted that the statute "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." *Id.* Because COPA, like Code § 18.2-152.3:1, outlawed broad categories of protected speech, the Third Circuit allowed the plaintiffs to mount a facial challenge.

Notably, the Third Circuit did *not* perform the sort of quantitative analysis—comparing the relative incidence of protected versus unprotected speech—

that Virginia now claims is essential to the Third Circuit's "comparative" approach to the substantial-overbreadth issue. The fact that the statute outlawed "a wide spectrum" of protected speech was enough.

So even the Third Circuit, the alleged standard-bearer of the "comparative" approach, found that a quantitative analysis was unnecessary when, as with Code § 18.2-152.3:1, the challenged statute outlawed broad categories of protected Internet speech. *See also DeJohn v. Temple Univ.*, 537 F.3d 301, 320 (3d Cir. Aug. 4, 2008) (striking down a university harassing-speech policy as facially overbroad without first undertaking an empirical comparison of the relative percentages of protected versus unprotected speech covered by the policy).

* * *

This Court should see Virginia's conflict-in-authority argument for what it is: a creative attempt to obtain certiorari by manufacturing a fissure in the case law that simply does not exist. It is notable that none of the cases that Virginia cites discusses this so-called "conflict" in authority. Nor has Virginia cited any secondary literature that mentions such a "conflict." The silence on this issue is telling.

III. THE PRACTICAL SIGNIFICANCE OF THIS CASE TO ANTI-SPAM EFFORTS IS NEGLIGIBLE.

In their briefs, Virginia and Amici argue that the ruling of the Supreme Court of Virginia jeopardizes anti-spam efforts across the country. Although Virginia acknowledges that most states—and the federal government—restrict their anti-spam

statutes to commercial spam, it claims that "ten" states have anti-spam statutes that, like Code § 18.2-152.3:1, do not differentiate between commercial and non-commercial bulk e-mails. (Pet. at 7, n.2). Thus, it suggests, if the courts of these 10 states follow the Supreme Court of Virginia's lead, then their statutes also might be found to be unconstitutional. Amicus United States Internet Service Provider Association, too, decries the effect of the Supreme Court of Virginia's decision on anti-spam efforts. (Am. Br. of US ISPA at 10).

This hand-wringing is unwarranted. As an initial matter, Petitioner's analysis of its Sister States' laws is faulty. Two of the states that it characterizes as banning "all spam," Idaho and Louisiana, actually limit their anti-spam efforts to commercial spam.[9] Another state, Illinois, bans only those e-mails that are sent without the authority of the computer user. (This is akin to a trespass statute and is *unlike* Code § 18.2-152.3:1, which applies even if the recipient wishes to receive unsolicited e-mails.) Of the remaining seven states, two states, West Virginia and Oklahoma, impose only civil sanctions for violations. *See* W. Va. Code § 46A-6G-5; 15 Okla. Stat. § 776.2, 776.7. So only five states—none of which has joined the Amici in this case—are similar to Virginia in imposing criminal penalties for unsolicited non-commercial bulk e-mails regardless

---

[9] Idaho's anti-spam statute applies only to "bulk electronic mail advertisements." Idaho Code § 48-603E. Louisiana defines "unsolicited bulk electronic mail" to include only those emails that are "developed or distributed in an effort to sell or lease consumer goods or services." La. Rev. Stat. § 14:73.1(13).

of whether the recipient has authorized the transmission.[10]

Even for those five states, the cure for the problem is simple: limit anti-spam statutes to commercial e-mails. In the interim, the federal CAN-SPAM Act—which *is* restricted to commercial e-mail and has withstood First Amendment challenges—provides a federal remedy against spammers. The undeniable fact is that this case's effect on anti-spam efforts is negligible, at most. As correctly observed by John Levine, an expert on Internet issues who testified for the prosecution in this case, the Supreme Court of Virginia's decision has "little practical effect beyond this single case."[11]

IV. THE VIRGINIA SUPREME COURT CORRECTLY APPLIED THE OVERBREADTH DOCTRINE.

Finally, certiorari is not appropriate as a matter of error correction because there was no error below. The facts of the present case show that the Virginia Supreme Court correctly applied this Court's substantial-overbreadth standard and properly allowed Jaynes to mount a facial challenge to Code § 18.2-152.3:1.

As this Court noted in *Williams*, the initial step in any overbreadth analysis is to interpret the

---

[10] These are Connecticut, Iowa, Nevada, Pennsylvania, and Tennessee.

[11] John Levine, "Virginia Court Overturns Anti-Spam Law, Sept. 13, 2008, http://www.cauce.org/archives/87-Virginia-Court-Overturns-anti-spam-law.html (last visited February 5, 2009).

statute in question. 128 S. Ct. at 1838 ("[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers."). If the problematic overbreadth can be excised with a limiting construction, then that ends the inquiry. *Id.* at 1848 ("[A]ny constitutional concerns that might arise . . . are surely answered by the construction the court gives the statute's operative provisions").

On this point, it is significant that the present case concerns a Virginia statute and arises on direct appeal from the Virginia Supreme Court. Where, as here, this Court reviews a state-court decision that has interpreted a state statute, the construction placed on the statute by the state court is binding on this Court. *See New York v. Ferber*, 458 U.S. 747, 769 n. 24 (1982) ("Here, of course, we are dealing with a state statute on direct review of a state-court decision that has construed the statute. Such a construction is binding on us."); *R. A. V. v. City of St. Paul*, 505 U.S. 377, 412 (1992) ("Where a state court has interpreted a provision of state law, we cannot ignore that interpretation, even if it is not one that we would have reached if we were construing the statute in the first instance.") (White, J., concurring). This is so because under our federal system, the Virginia Supreme Court is the authoritative expositor of the meaning of Virginia statutes.

In the proceedings below, Virginia argued that Code § 18.2-152.3:1 should be narrowly construed to (1) exempt "unsolicited bulk non-commercial e-mail that does not involve criminal activity, defamation or obscene materials" and (2) apply only where the recipient's ISP "actually objects to the bulk e-mail."

(Pet. App. at 27). Narrowing the statute in this way would, of course, have eliminated much of the statute's problematic overbreadth. But in its decision, the Virginia Supreme Court held that there was no textual basis for such a limiting construction:

> Our jurisprudence requires us to interpret a statute to avoid a constitutional infirmity. Nevertheless, construing statutes to cure constitutional deficiencies is allowed only when such construction is reasonable. A statute cannot be rewritten to bring it within constitutional requirements. The construction urged by the Commonwealth is not a reasonable construction of the statute. Nothing in the statute suggests the limited applications advanced by the Commonwealth. If we adopted the Commonwealth's suggested construction we would be rewriting Code § 18.2-152.3:1 in a material and substantive way. Such a task lies within the province of the General Assembly, not the courts.

(Pet. App. at 27-28) (internal citations omitted). Not only is this reasoning sound, it is binding on this Court. Thus, unlike the federal statute in *Williams*, Code § 18.2-152.3:1 cannot be purged of its overbreadth simply by adopting a narrowing construction that limits the statute's application to constitutionally less-protected speech. This Court must take the statute as the Virginia Supreme Court has interpreted it.

Evaluating Code § 18.2-152.3:1 in light of its interpretation, the Supreme Court of Virginia correctly held that the statute was substantially overbroad. The law directly targets speech and its operative provision makes it a crime to falsify "transmission information" with respect to any "unsolicited bulk e-mail."[12] Va. Code § 18.2-152.3:1. The term "unsolicited bulk e-mail" is not restricted to commercial spam. Thus, it extends well beyond the get-rich-quick schemes, mortgage ads, and male-enhancement promotions that have given rise to anti-spam legislation. It also applies to personal e-mails, forwarded jokes and news items, political e-mails, religious e-mails, and every other species of protected e-mail speech.

In this respect, Code § 18.2-152.3:1 is an outlier. Most states have passed anti-spam laws of one form or another. But almost all of them limit their laws regulating (non-sexually-explicit) spam to

---

[12] In their amicus brief, Virginia's Sister States attempt to equate falsification with deception and fraud. (Am. Br. of Alabama *et al.* at 20). The two concepts are not identical. A writer can falsify his identity in order to remain anonymous even if no one is thereby fooled into believing that the writer truly is the person he calls himself. When Alexander Hamilton adopted the pen name "Publius," his audience was not deceived into thinking that the he was truly the so-named statesman from ancient Rome. They realized that the author—whoever he was—was adopting an assumed name. Yet as the Supreme Court of Virginia interpreted the statute, Code § 18.2-152.3:1 would apply equally to this sort of innocent use of a pseudonym in an e-mail transmission. (Pet. App. at 26-27).

commercial e-mails.[13] Congress, too, limited the federal "CAN-SPAM" Act to commercial unsolicited

---

[13] *See* Ariz. Rev. Stat. § 44-1372.01 (barring falsification of electronic transmission information by sender of "*commercial* electronic mail"); Ark. Code Ann. § 4-88-603 (requiring senders of "unsolicited *commercial* electronic mail" to provide correct identification information); Cal. Bus. & Prof. Code § 17538.45 (regulating "unsolicited electronic mail *advertisements*"); Colo. Rev. Stat. § 6-1-702.5 (regulating "*commercial* electronic mail messages"); Fla. Stat. § 668.603 (regulating "unsolicited *commercial* electronic mail message"); Idaho Code § 48-603E (barring falsification of transmission path of "bulk electronic mail *advertisement*"); Ill. Comp. Stat. tit. 815, § 511/10 (regulating "unsolicited electronic mail *advertisements*"); Ind. Code § 24-5-22-7 (regulating transmission of "*commercial* electronic mail messages"); Kan. Stat. § 50-6, 107 (regulating "*commercial* electronic mail messages"); La. Rev. Stat. § 14:73.1(13) (defining "unsolicited bulk electronic mail" to mean only those that are sent "in an effort to *sell or lease consumer goods or services*"); Me. Rev. Stat. tit. 10, § 1497 (regulating "unsolicited *commercial* e-mail"); Md. Crim. Law Code § 3-805.1 (barring falsification of "multiple *commercial* electronic mail messages"); Mich. Comp. Laws § 445.2504 (barring falsification of sender information for "unsolicited *commercial* e-mail"); Minn. Stat. § 325F.694 (regulating false or misleading "*commercial* electronic mail messages"); Mo. Rev. Stat. § 407.1138 (prohibiting falsification of sender information for "*commercial* electronic mail messages"); N.M. Stat. Ann. § 57-12-23 (regulating e-mails containing "unsolicited *advertisements*"); N.C. Gen. Stat. § 14-458 (unlawful to send "unsolicited bulk *commercial* electronic mail" in violation of e-mail service provider policies); N.D. Cent. Code § 51-27-02 (unlawful to send falsified "*commercial* electronic mail message"); Ohio Rev. Code § 2307.64 (unlawful to forge originating address or routing information of "electronic mail *advertisement*"); S.D. Codified Laws § 37-24-6 (regulating "unsolicited *commercial* electronic mail messages"); Tenn. Code Ann. § 47-18-2501 (prohibiting falsification of transmission information in e-mails consisting of "unsolicited *advertising material*"); Tex. Bus. & Com. Code § 46.002 (barring falsification of transmission information in "*commercial* electronic mail messages"); Wash. Rev. Code § 19.190.020 (prohibiting falsification of transmission information in a "*commercial* electronic mail message"); Wyo. Stat. § 40-12-402 (prohibiting falsification of transmission information in a "*commercial* electronic mail message") (emphasis added in all).

bulk e-mail. *See* 15 U.S.C. § 7704(a) ("It is unlawful for any person to initiate the transmission, to a protected computer, of a *commercial* electronic mail message, or a transactional or relationship message, that contains, or is accompanied by, header information that is materially false or materially misleading . . . .") (emphasis added).

Internet-speech regulations that extend beyond commercial speech may, for that reason alone, be found to be overly broad. In *Reno v. ACLU*, for example, this Court held that the Communications Decency Act was overbroad inasmuch as it was "not limited to commercial speech or commercial entities." 521 U.S. 844, 877 (1997).[14] Code § 18.2-152.3:1 is similarly overbroad. It makes no attempt to distinguish between commercial and non-commercial e-mails.

To illustrate the statute's extreme overbreadth, the Supreme Court of Virginia explained that under Code § 18.2-152.3:1, distributing the *Federalist Papers*—which this Court has singled out as the exemplar of anonymity being "assumed for the most constructive purposes"[15]—would be a crime if done by e-mail. (Pet. App. at 27).

---

[14] *See also Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150, 165 (2002) (ordinance barring anonymous door-to-door solicitations was overbroad because it was not restricted to commercial speech); *United States v. Twombly*, 475 F. Supp. 2d 1019, 1024 (S.D. Cal. 2007) (noting, in context of reviewing state spam law, that a "statute reaching beyond purely commercial speech to chill fully protected speech can merit application of the overbreadth doctrine").

[15] *Talley v. California*, 362 U.S. 60, 65 (1960). *See also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 n.6 (1995).

In its Petition, however, Virginia dismissively characterizes this as yet another "hypothetical case" that has been conjured up to justify an otherwise baseless facial challenge. (Pet. at 23). Virginia has missed the point of the *Federalist Papers* example. This was not a "fanciful hypothetical"; it was a *reductio ad absurdum* showing just how intolerably overbroad Code § 18.2-152.3:1 is. If the foundational documents of the Constitution could not legally be disseminated by e-mail under Code § 18.2-152.3:1, then surely the statute itself cannot survive scrutiny under the Constitution.

Virginia's real objection is that the lower court did not quantify and compare the instances of protected anonymous e-mails versus unprotected anonymous e-mails. But a few common-sense considerations must enter into this calculus. First, given that unprotected commercial spam now constitutes over 80% of all e-mail traffic (Pet. at 4), *any* class of protected e-mails likely will be only a small percentage of e-mails affected by a statute that targets e-mail. But that does not mean that e-mail is not worthy of First Amendment protection. In Virginia's "comparative" analysis, however, this does not matter. Under its view, so long as the relative incidence of protected versus unprotected e-mails is small, a state is free to regulate *all* e-mails in whatever way it chooses without risking a facial challenge. By this logic, a statute that bans *all* e-mail communications would be insulated from facial challenge simply because the vast majority of e-mail is unwanted spam—the baby could be thrown out with the bathwater so long as there was a lot of bathwater. That is neither good sense nor good law.

Second, Virginia ignores the ease with which Code § 18.2-152.3:1's overbreadth could have been cured by Virginia's General Assembly. Here, eliminating most of the statute's problematic overbreadth would have been as simple as limiting Code § 18.2-152.3:1 to *commercial* spam—something that the federal CAN-SPAM Act and nearly every other state anti-spam statute has done.[16] This is not a circumstance where, due to the difficulty of drawing a statutory line between protected and unprotected communications, some protected speech is unavoidable collateral damage. As the Virginia Supreme Court correctly observed, limiting the statute to commercial speech would not have diminished the efficacy of the statute against its true target: commercial spam. (Pet. App. at 24). Indeed, there was absolutely no evidence that bulk *non*-commercial e-mail was a problem that the Virginia General Assembly felt needed to be addressed. (*Id.*). In short, the overbreadth of Code § 18.2-152.3:1's was entirely gratuitous. The Supreme Court of Virginia correctly emphasized this fact in striking the statute down.

Third, Virginia's argument disregards the practical problems raised by cases in which litigants bring facial First Amendment challenges on anonymous-speech grounds. Persons wishing to

---

[16] *See supra* note 13. Indeed, now pending before the Virginia General Assembly is House Bill No. 1796, which amends Va. Code § 18.2-152.2 to include a definition for "commercial electronic mail" and which adds § 18.2-152.3:2, a section nearly identical to current § 18.2-152.3:1 but which is limited to commercial electronic mail. The summary of the bill states that "[t]his bill parallels the existing spam law but limits application to commercial electronic mail."

communicate anonymously are, by definition, persons who do not want their affiliation with an article, e-mail, or cause disclosed to the public. Thus it would be nearly impossible for a litigant to locate and identify—let alone present the trial testimony of—a person who wished to communicate anonymously but whose speech was chilled by the statute in question. Yet that is exactly the sort of proof that Virginia demands of Jaynes.

To summarize: *Code* § 18.2-152.3:1 is substantially overbroad, unnecessarily overbroad, and unconstitutionally overbroad. The Supreme Court of Virginia correctly allowed Jaynes to mount a facial First Amendment challenge to it.

CONCLUSION

Because Virginia raises its "comparative analysis" argument for this first time on appeal, because the facial-standing issue—even if adequately preserved—raises no significant new issues worthy of this Court's attention, because the practical effect of the decision below is nil, and because the lower court decided the matter correctly under this Court's settled substantial-overbreadth standard, this Court should deny certiorari.

Respectfully submitted,

/s/ Thomas M. Wolf
Thomas M. Wolf
Counsel of Record
LECLAIR RYAN,
A PROFESSIONAL CORPORATION
951 East Byrd Street, 8th Floor
Richmond, Virginia 23219
(804) 916-7143 (Telephone)
(804) 916-7243 (Facsimile)

Joseph M. Rainsbury
LECLAIR RYAN,
A PROFESSIONAL CORPORATION
1800 Wachovia Tower
Drawer 1200
Roanoke, Virginia 24006
(540) 510-3055 (Telephone)
(540) 510-3050 (Facsimile)